Supreme Court, U. S.
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In the Supreme Court of the United States

Term, 1979

No. 79-586

WILLIAM R. KRAYNAK, THOMAS KRAYNAK, GEORGE ROBERT KRAYNAK AND RICHARD KRAYNAK, a partnership T/D/B/A/ KRAYNAK COAL COMPANY, No. 3 MINE,

Petitioners

vs.

RAY MARSHALL, SECRETARY OF LABOR,

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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WILLIAM R. KRAYNAK, THOMAS KRAYNAK, GEORGE ROBERT KRAYNAK AND RICHARD KRAYNAK, a partnership T/D/B/A/ KRAYNAK COAL COMPANY, No. 3 MINE,

Petitioners

vs.

RAY MARSHALL, SECRETARY OF LABOR,

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 22, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, as yet unreported, appears at Appendix A. The opinion of the United States District Court for the Western District of Pennsylvania is reported at 457 F. Supp. 907 (W.D. Pa. 1978) and appears at Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). The order of the Court of Appeals was entered on August 22, 1979.

QUESTIONS PRESENTED

The Court of Appeals for the Third Circuit affirmed a district court order granting a permanent injunction enjoining Petitioners from refusing to permit inspections of their coal mine by representatives of the Department of Labor. Petitioners are brothers who jointly own and operate Kraynak Coal Company Mine No. 3. Petitioners do not employ any individuals in the mine's operations and mine all coal by themselves. All coal is sold and consumed entirely within Pennsylvania. The questions thereby arising are:

1. Whether an owner-operator of a coal mine with no employees is a "miner" as defined in the Federal Coal Mine Health and Safety Act.

2. Whether a coal mine affects interstate commerce and is subject to the Act merely by selling coal to a customer engaged in interstate commerce.

STATUTORY PROVISIONS INVOLVED

Section 3(g) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat 744, *as amended*, 30 U.S.C. §802(g) (1979) provides:

> (g) "miner" means any individual working in a coal or other mine;

Section 4 of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat 744, *as amended* 30 U.S.C. §803 (1979) provides:

> "Each coal or other mine, the products of which enter commerce or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Chapter."

Other relevant statutory provisions are reprinted in Appendix C, pp. 24-32.

STATEMENT OF THE CASE

Petitioners are four brothers who are the sole owners and operators of a coal mine in Western Pennsylvania. All mining operations and activities are performed by Petitioners without the assistance of any mine employees. (A.23a-24a)[1] Mine No. 3 produces approximately 9,000 tons of coal per year, all of which is mined, delivered and consumed in the State of Pennsylvania. The primary purchaser of Petitioners' coal was a manufacturing facility known as Penntech Papers, which used it to produce steam to dry their paper products and to operate two steam turbines. (A.47a;54a).

Despite the fact that Petitioners employ no miners, on April 27, 1977, representatives of the Mining Enforcement and Safety Administration attempted to conduct an inspection of Petitioners' mine pursuant to Section 103(a) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat 749, *as amended* 30 U.S.C. §813 (1979) (hereinafter referred to as the "Act"). Petitioners refused to permit this inspection, and the Secretary of the Interior (hereinafter referred to as "government")[2] commenced an action seeking a Preliminary and Permanent Injunction enjoining Petitioners from refusing to permit inspections of their mine. The government's

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[1]Page references are to the Appendix on Appeal to the United States Court of Appeals for the Third Circuit which has been included in the certified record to this Court.

[2]On August 3, 1978, the Secretary of Labor was substituted as the Plaintiff in this proceeding.

Motion for Preliminary Injunction was denied on September 8, 1977. On May 12, 1977, the government filed a Motion for Summary Judgment which was granted by the district court on September 27, 1978. Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on October 25, 1978, and on August 22, 1979 the Third Circuit affirmed the decision of the district court. On September 7, 1979, the United States Court of Appeals for the Third Circuit ordered the stay of the issuance of the certified judgment pending the disposition of this petition to be filed on or before October 12, 1979.

Jurisdiction of the District Court was founded upon Section 108 of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat 756, 30 U.S.C. §818. (1979).

REASONS FOR GRANTING THE WRIT

1. The Lower Court Applied An Erroneous Principle Of Statutory Construction In Determining That Owner-Operators Of Coal Mines With No Employees Are "Miners" As Defined In The Act.

Petitioners' argued before the lower court that in enacting this Act Congress did not intend to regulate coal mines with no employees, and that owners of small mines who mine their own coal are excluded from its coverage. Petitioners' relied on the legislative history of the Act, the Congressional declaration of purpose and the provisions of the Act to support this contention. However, both the district court and the Court of Appeals for the Third Circuit resolved this issue by restricting their inquiry solely to the definitional provisions of the Act. Section 3(g) of the Act, 83 Stat. 744, *as amended* 30 U.S.C. §802(g)(1979) defines a miner as "any individual working in a coal or other mine." The Third Circuit stated:

> "Like the district court we feel that this statutory language is free from ambiguity and comports with the legislative purpose "to require that...every miner in such mine comply with [the] standards." (Appendix p. 14).

This restricted analysis was insufficient and erroneous. The court failed to apply the well established rule of statutory construction that even if an activity or situation is within the literal meaning of a statute, it is not covered by the statute unless coverage of that activity or situation was intended by the legislature. *Muniz v. Hoffman*, 422 U.S. 454, 95 S.Ct. 2178, 45 L.Ed. 2d 319 (1975); *Philbrok v. Glodgett*, 421 U.S. 707, 95 S.Ct. 1893, 44 L.Ed. 2d 55 (1975).

There can be no question that in enacting this legislation Congress intended to protect the health and safety of miners *employed* in mines. The Congress felt that such miners are without adequate resources to compel coal mine operators to establish and comply with effective health and safety standards, and lack adequate resources to protect themselves and their families in the event that they become disabled as a result of mine employment. Such considerations simply do not apply when the miner is also the owner of the mine. Contrary to the lower court's assertion, Petitioners do not place a lower value on the life or health of an owner-operator. It is because they place such a great value on their own health and safety that external regulation is unnecessary.

This fact was clearly recognized by Congress since the provisions of the law are inapplicable when there are no employees, and indeed are meaningless when applied to such a situation. For example, under the 1977 amendments an untrained miner must be withdrawn from a mine upon order of the government, Section 104(g), 91 Stat. 1302, 30 U.S.C. §814(g)(1979), and Section 115, 91 Stat. 1315, 30

U.S.C. §825(b)(1979) requires mandatory training. In either situation the miner must receive his normal rate of pay during enforced inactivity or training. §104(g), 91 Stat. 1303, 30 U.S.C. §814(g)(2)(1979); §115(b), 91 Stat. 1315, 30 U.S.C. 825(b)(1979). Obviously, an owner who is also working in his mine cannot comply with provisions such as these. Since an owner-operator cannot comply with these or other provisions, to conclude that Congress intended such coverage is to conclude that Congress intended to achieve an irrational result.

Considerations such as these led the court in the case of *Morton v. Bloom*, 373 F. Supp. 797 (W.D.Pa. 1973) to conclude that:

> "...[it] was not a part of the legislative intent of Congress to subjugate a one-man owner-operated coal mine to...the Act." 373 F.Supp. at 789.

This Court should take this opportunity to declare that, indeed, the court in *Morton v. Bloom* was correct, and that Congress cannot have intended to achieve irrational results.

2. The Lower Court Improperly Determined That Jurisdiction Existed Over A Wholly Intrastate Activity.

Section 4 of the Act, 83 Stat. 744, *as amended* 30 U.S.C. §803 (1979) extends jurisdiction over "each coal or other mine, the products of which enter commerce, or the operations or the products of which affect commerce...." The finding of jurisdiction under the facts of this case was erroneous, and warrants review by this Court.

The lower court did not discuss the first jurisdictional basis of the Act but, quoting the district court, held that "the selling by the defendants of over 10,000 tons of coal annually to a paper producer whose products are nationally distributed enters and affects interstate commerce within the meaning of Section 803 of the Act." (Appendix A, at p. 15). It

based this conclusion on the legislative history of the Act which it felt indicated that Congress intended to exercise its authority to regulate interstate commerce to the maximum extent feasible through legislation. Nonetheless, the commerce clause does not reach every activity which is related to interstate commerce. Courts must consider whether the activity involved has such a substantial effect upon interstate commerce so as to warrant regulation. No such substantial effect exists in this case.

It is well established that courts must determine not only that the acts involved affect a business engaged in interstate commerce, but that they affect the interstate commerce of such business in a substantial manner. *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973); *Rasmussen v. American Dairy Association*, 472 F.2d. 517 (9th Cir. 1972), *cert. denied*, 412 U.S. 950, 93 S.Ct. 3014, 37 L.Ed. 2d 1003 (1973). No such finding was made in this case. To hold that interstate commerce is affected because Penntech Papers could not produce its products without power, and that therefore the supplier of some of that power substantially affects interstate commerce, significantly expands the reach of the commerce clause.

It is also important for courts to determine whether regulation of the activity sought to be regulated substantially affects the exercise of the power to regulate interstate commerce, and whether it affects the purposes which Congress intended to achieve. In this Act Congress intended to (a) prevent dislocations to interstate commerce in coal caused by mine accidents, and (b) to protect the health of miners. Section 2, 83 Stat. 743, *as amended* 30 U.S.C. §801 (1979). Yet, neither goal is achieved, or even affected, by regulating a mine which engages only in intrastate activities and has no employees.

The analysis of the court in *Morton v. Bloom, supra*, is particularly applicable here. In that case the court deter-

mined that the activities of an owner-operated mine with no employees did not affect interstate commerce. In the pertinent part of its opinion, the court ruled:

> "To affect commerce and thus be subject to the regulations of the Act, the activity must 'in a substantial way interfere with or obstruct the exercise of the granted power [i.e. the power to regulate interstate commerce].' *United States v. Wrightwood Dairy Co., supra.* This Court cannot conclude that defendant's one-man mine operation will substantially interfere with the regulation of interstate commerce. Moreover, the stated purpose of the Act—safety of mine workers—is not affected or diminished by its non-application to defendant. Furthermore, the fact that defendant's mining operation does not comply fully with the requirements of the Act does not mean that the stated purpose of the Act—the safety of miners—will be thwarted. In other words, to the extent that Congress seeks to regulate mine safety, as opposed to regulating the price of coal through the commerce power, this Court cannot conclude that interstate commerce will be affected by the failure of one-man mine operations, which by their very nature require the exercise of self-imposed safety measures, to comply with the Act.
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> • • • •
>
> Defendant's mine is one of local character in which the implementation of safety features required by the Act will not exert substantial economic effect on interstate commerce. This Court cannot conclude that Congress intended to reach defendant's mine by passage of the Act." 373 F. Supp. at 799.

For these reasons, the lower court's conclusion that the jurisdictional bases of the Act had been met is e oneous and results from the application of improper sta ıards.

3. The Lower Court Did Not Resolve The Conflict Among Decisions Within The Third Circuit Regarding The Scope Of This Act.

Four other cases involving the issues raised by Pet tioners have been considered by the Western and Middle Districts of Pennsylvania in addition to the instant case. In *Morton v. Bloom*, 373 F. Supp. 797 (W.D. Pa. 1973), the court concluded that application of the Act to mines without employees was absurd. In *Secretary of the Interior v. Shingara*, 418 F. Supp. 693 (M.D. Pa. 1976), the Court did not decide the definitional issue presented by Petitioners but did note in passing that the Act did not explicitly exempt such mines. In an unreported case, *Andrus v. Kaskin*, C.A. 77-259 (W.D. Pa., October 20, 1977) (A. 62a-64a) the court held that the activities of the mine in question entered or affected interstate commerce. The court did not resolve the definitional issue presented because it was apparent that defendants in that case had employed other persons at various times during previous years. Finally, in another unreported case, *Morton v. Pappal*, C.A. 75-95 (W.D. Pa. May 5, 1975), (A. 57a-61a) the court declined to extend the coverage of the Act to an owner-operated coal mine with no employees, based on the rationale of *Morton v. Bloom, supra*, and by finding that the operations of the defendant did not affect interstate commerce.

The confusion engendered by these various cases has not been resolved by the lower court's decision in this case. As indicated above, the lower court relied exclusively upon the definitional provisions of the Act in determining that owner-operators were within the scope of the Act. This analysis is incomplete and does not resolve the fundamental issue presented by the fact that the Act is meaningless when applied to such persons. Moreover, the lower court did not resolve the commerce clause problem presented because it

based its decision on the volume of business in which Petitioners engaged and the fact that Petitioner's customer was engaged in interstate commerce. There was no consideration of the minimal effect of Petitioner's intrastate activities upon interstate commerce, and the lack of any effect on the health and safety of miners employed by others. The failure of the lower court to consider these issues leaves the state of the law unsettled and requires resolution.

4. Subjecting This Coal Mine And Others Similarly Situated To The Jurisdiction Of This Act Has A Substantially Adverse Affect On Owner-Operators, Consumers, And The Persons Intended To Be Protected By The Act.

The lower court was not presented with issues regarding the substantially adverse effects which will be caused by application of the Act to owner-operators of coal mines with no employees. It accordingly made no factual findings regarding those effects. These considerations are important, however, in determining whether this Court should exercise its discretion and decide to resolve the issues presented by Petitioners.

Petitioners assert that the application of this Act to owner-operators of coal mines with no employees will have substantially adverse effects upon the operations of those mines, upon the consuming public in general, and upon the persons whom Congress intended to protect. First, it is apparent merely by reviewing the provisions of this Act that its application to owner-operators with no mine employees will have a devastating, and perhaps terminal, effect on their operations. An owner-operator of a coal mine with no employees simply cannot comply with the requirements of the Act. Those provisions were drafted with the view towards an employer-employee situation and do not apply and have no meaning where there are no employees. Yet,

while owner-operators cannot comply with the provisions of the Act, failure to comply with those provisions subjects the owner-operators to substantial fines and penalties, including the requirement to cease operating until compliance occurs. *See, for example*, §104(a), 83 Stat. 750, *as amended*, 30 U.S.C. §814(d)(1) (1979); §109(a)(1), 83 Stat. 756, *as amended* 30 U.S.C. §820(a) (1979). It is not unreasonable to conclude that application of this Act to owner-operators will lead to curtailment or elimination of their business activities.

Second, this Court should also consider the effect upon the consumer and this nation of applying this Act to Petitioners and other owner-miners. This Court can take judicial notice of the current energy crisis. The energy program promulgated by the President of the United States seeks to end this country's dependence upon foreign oil reserves for reasons of national security. One key element of that program is the development and utilization of this nation's vast coal reserves. Yet, the Secretary of Labor seeks to apply this Act in such a manner that this nation's coal production will almost inevitably be decreased.

Finally, there is no question that the persons designed to be protected by this Act are coal miners. However, by regulating coal mines which have no employees the Secretary of Labor diverts his limited resources from protecting those who are employed as miners. This diversion of resources endangers the persons whom Congress intended to protect.

If indeed Congress intended the Secretary of Labor to exercise jurisdiction over owner-operated coal mines with no employees, then these questions are ones of bureaucratic discretion. But, if Congress did not intend to regulate such mines, the current interpretation of the Act by the Secretary of Labor frustrates Congressional purpose and represents an unwarranted intrusion into intrastate activities with potentially devastating results. The gravity of the consequences of the government interpretation merits review by this Court.

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MEYER, UNKOVIC & SCOTT

.....

William P. Getty

APPENDIX A

FOR PUBLICATION

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-2576

RAY MARSHALL, Secretary of Labor
vs.
WILLIAM R. KRAYNAK, THOMAS KRAYNAK, GEORGE ROBERT KRAYNAK, and RICHARD KRAYNAK, a partnership, Trading and Doing Business as KRAYNAK COAL COMPANY, No. 3 MINE,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. CIVIL No. 77-0962)

Submitted Under Third Circuit Rule 12(6)
August 7, 1979
Before: ALDISERT, VAN DUSEN and WEIS,
Circuit Judges.
(Filed Aug. 22, 1979)

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APPENDIX A

OPINION OF THE COURT

PER CURIAM

This appeal from summary judgment in favor of the Secretary of Labor, brought by the owners of a small coal mine, requires us to decide whether the provisions of the Federal Coal Mine Act apply to circumstances in which the only miners working a mine are the four brothers who own and operate it. The district court determined that the miner-operators came within the provisions of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§801-960 (1976). We affirm for the reasons stated by the Honorable Louis Rosenberg, 457 F.Supp. 907 (W.D.Pa. 1978), and by Judge Muir in his opinion in *Secretary of the Interior v. Shingara*, 418 F.Supp. 693, 695 (M.D.Pa. 1976). Judge Rosenberg explained that although section 802(d) defines an "operator" as one who operates, controls or supervises a mine, section 802(g) provides that a "miner" means "*any* individual working in a coal or other mine." 30 U.S.C. §802(d), (g) (Supp.I 1977) (emphasis added). Like the district court we feel that this statutory language is free from ambiguity and comports with the legislative purpose "to require that . . . every miner in such mine comply with [the] standards." 30 U.S.C. §801(g)(2) (Supp. I 1977). *See Marshall v. Stoudt's Ferry Preparation Co.*, F.2d , No. 78-2364 (3d Cir. July 19, 1979).

Appellants also argue that the Coal Mine Act does not reach them because their mine sells coal only intrastate to the Penntech Papers Company. They contend that these sales are insufficient to bring their operation within section 803, which declares that the act covers "[e]ach coal or other mine, the products of which enter commerce, or the operator or products of which affect commerce." In enacting the statute, Congress intended to exercise its authority to regulate inter-

state commerce to "the maximum extent feasible through legislation." S. Rep. No. 1005, 89th Cong., 2d Sess. 1, *reprinted in* [1966] U.S. Code Cong. & Ad. News 2072, 2072. We agree with Judge Rosenberg's conclusion that "the selling by the defendants of over 10,000 tons of coal annually to a paper producer whose products are nationally distributed enters and affects interstate commerce within the meaning of §803 of the Act." 457 F.Supp. at 911. *See also Shingara*, 418 F.Supp. at 694-95.

The judgment of the district court will be affirmed.

.....

To The Clerk:

Please file the foregoing opinion.

.....

Circuit Judge

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-2576

RAY MARSHALL, Secretary of Labor

vs.

WILLIAM R. KRAYNAK, THOMAS KRAYNAK, GEORGE ROBERT KRAYNAK, and RICHARD KRAYNAK, a partnership, Trading and Doing Business as KRAYNAK COAL COMPANY, NO. 3 MINE,
Appellants

(D. C. Civil Action No. 77-0962)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, VAN DUSEN and WEIS,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on August 7, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 27, 1978, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ THOMAS F. QUINN
Clerk

August 22, 1979

APPENDIX B

In The United States District Court For The Western District Of Pennsylvania

RAY MARSHALL, SECRETARY OF LABOR,
Plaintiff

v.

WILLIAM R. KRAYNAK, THOMAS KRAYNAK, GEORGE ROBERT KRAYNAK and RICHARD KRAYNAK, a partnership, trading and doing business as KRAYNAK COAL COMPANY, No. 3 Mine,
Defendants

Civil Action No. 77-962

OPINION

ROSENBERG, *District Judge*

The matter now before me is on a motion for summary judgment filed by the plaintiff, Ray Marshall, Secretary of Labor, under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (hereinafter called the "Act"). The plaintiff seeks to enjoin the defendants, William R. Kraynak, Thomas Kraynak, George Robert Kraynak, and Richard Kraynak, a partnership, trading and doing business as Kraynak Coal Company, No. 3 Mine, from refusing Federal Inspectors, agents of the plaintiff, to inspect the Kraynak coal mine.

The defendants resist the action of the plaintiff on the basis that (1) the mine is totally owned and worked by them, four brothers, as owners, and accordingly no employees are "involved" as contemplated by the Act, and (2) the coal

mined by them is totally sold and consumed within the State of Pennsylvania, intrastate, and does not involve interstate commerce.

Based upon the record, pretrial discovery matter, and the affidavit and admission of the defendants in their recital of the facts in their brief, the facts are not in dispute.

The mine in question, known as No. 3 Mine, is located in Wilgus, Indiana County, Pennsylvania and is owned and operated entirely by four brothers, the defendants herein. No other personnel have worked for the defendants from a period of at least seven years and this situation is expected to continue.

On April 27, 1977, pursuant to §103 of the Act, 30 U.S.C. §813[1] authorized representatives of the plaintiff went to the mine to conduct an inspection. By the use of four dogs the defendants prevented the inspectors from leaving their vehi-

[1]§813. Inspections and investigations - Purposes.
"(a) Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines; (2) gatherine [sic] information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order or decision issued under this subchapter. In carrying out the requirements of clauses (3) and (4) of this subsection, no advance notice of an inspection shall be provided to any person. In carrying out the requirements of clauses (3) and (4) of this subsection in each underground coal mine, such representatives shall make inspections of the entire mine at least four times a year."

Further additional subsections provide the right of the Secretary to have "a right of entry to, upon, or through any coal mine" for purposes of inspection, developing improved mandatory health standards, procuring records and the like. In addition, provision is made for public hearings, consultation with appropriate state representative "when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal" together with provisions for notice.

cle, and they left. The inspectors returned later that day and succeeded in meeting with Thomas Kraynak, one of the defendants. Again the inspectors were refused admittance. The defendants admit that in 1977 they produced 12,524 tons of coal, 9,000 tons of which came from Mine No. 3, the mine in question, and that during that same period, the defendants delivered to Penntech Papers, Inc., a total of 10,268 tons amounting to over 80% of the defendants' total production. Penntech is a paper processing corporation actively engaged in interstate commerce and depends upn commerce with facilities in other states for its supplies of raw materials. Upon completion of the paper producing process, the various products are sold throughout the country with only approximately 5% remaining within the state.

The first question raised by the defendants is that under the holding of *Morton v. Bloom*, 373 F.Supp. 797 (D.C.Pa. 1973), an owner-operated mine, which produces only a minimal amount of coal, sells its product wholly within the state, and does not employ any miners, is not subject to the provisions of the Act. In the *Bloom* case, *supra*, a single man owned and operated his mine and sold the coal entirely intrastate. The court decided the issue solely on the producer's effect on interstate commerce, which it held to be minimal. No specific reference was made as to whether owner-operated mines are excluded from the Act. The question of interstate commerce, however, was considered and held not to apply.

The legislative history of the Act clearly indicates that Congress did not intend to create a special class of mines exempt from its coverage. The framers were concerned specifically with the Nation's attitude permeating the coal industry that mining was a hazardous occupation. Despite the hazardous nature, the Human Resources Committee was determined that these hazards be substantially reduced or

eliminated. U.S. Code, Cong. and Adm. News, page 3403. To this effect, the Committee announced that it was essential that there be a common regulatory program for all operators and equal protection under the law for all miners. Id. at page 3413.

By requesting support for differentiation between owner-operated mines from non-owner mines where employees labor, the defendants seek to place a value on an owner-operator's life as far below that of a miner in any employer-employee setting. The fact that one is part owner of an enterprise does not, in and of itself, give a court leave to allow such an owner the right to expose himself to unnecessary harm where Congress has otherwise directed. When a court sees fit to include within the Act an independent contractor involved in the sinking of shafts and excavating tunnels in a coal mine, as was done in *Bituminous Coal Operators' Ass'n. v. Secretary of Interior*, 547 F.2d 240, C.A. 4, 1977. it is unlikely that an owner who also mines his own coal would be placed in a separate class.

The intent of Congress is unambiguous that operators working as miners are included in the Act.

> Section 802(d) states, "'operator' means any owner, lessee or other persons who operates, controls, or supervises a coal or other mine of any independent contractor performing services or construction at such mine;"
>
> Section 802(g) states, "'miner' means any individual working in a coal or other mine;"
>
> Section 803 provides "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each *operator* of such mine, and every *miner* in such mine shall be subject to the provisions of this Chapter." (Emphasis supplied)

Accordingly, I find no difficulty, whatsoever, in holding that coal mine operators, particularly those who are at the same time miners, are included in the Act.

The second question raised by the defendants is that since they sold coal only intrastate to Penntech Paper Co. and that it was within the State, the Act does not include them. The undisputed fact here is that the defendants sold 9,000 tons of the coal mined at No. 3 Mine to Penntech and that Penntech used it with supplies procured interstate and sold 95% of the products so produced interstate.

In the case of Secretary of *Interior v. Shingara*, 418 F.Supp. 693 (D.C.Pa. 1976), the defendant's owner-operated mine sold its coal intrastate primarily to one C. V. Lenig. He in turn sold the coal, along with coal from other small producers, to Keystone Filler Mfg. Co. in intrastate transactions. Keystone then combined the coal with others, processed it into a powder and sold it to interstate customers. Although the defendant's contribution appeared far removed and rather miniscule, the court there held that the coal "clearly 'enters commerce'", or alternatively, "'affects commerce'", (at page 694).

The case of *Andrus v. Kaskan, et al.*, C.A. 77-259 (W.D.Pa. 1977) is also relevant to the instant matter. There the defendants sold 2,000 tons of coal annually to a broker who in turn sold it to a power company, all intrastate transactions. The power company, however, used the coal to produce electricity for both the forum state and its neighboring state. The court held that although defendant's mine contributed very little of the coal consumed, the combined production of all the nation's small, privately owned mines was certainly not negligible in affecting interstate commerce.

The circumstances of this case and the applicable law are no different than those in which the question of interstate commerce is raised, whether in civil or criminal proceed-

ings, and where it is shown that the labor involved, the sources of supplies and equipment and the movement of the finished product are interconnected with interstate commerce. For a detailed list of cases in which interstate commerce defines such circumstances see *United States v. Cerilli et al.*, 418 F.Supp. 557 (W.D.Pa. 1976).

In *Mandeville Island Farms, Inc., et al., v. American Crystal Sugar Co.*, 334 U.S. 219 (1947), the Supreme Court considered a case closely aligned to the principle involved in the instant case in an antitrust action relating to sugar beets and the sugar derived from these. When it was sought to show that sugar beets from which eventually sugar was procured were separate and distinct commodities, the Court said,

> "For mere change in the form of the commodity or even complete change in essential quality by intermediate refining, processing or manufacturing does not defeat application of the statute to practices occurring either during those processes or before they begin, when they have the effects forbidden by the Act." And cases therein cited in the footnote. (at page 238).

But in *Costanzo Coal Mining Co. v. Weirton Steel Co.*, 150 F.2d 929, C.A. 4, 1945, cert. den. 326 U.S. 365 (1945), we have practically the exact circumstance and principle involved in this case. In *Costanzo*, coal was mined, sold and used in furnaces of the Weirton Steel Co. in processing steel. The steel produced by the Weirton Steel Co. was sold interstate. It was held that the sale and delivery within the state of coal used by a buyer in producing steel which was sold and shipped to customers outside the state was within the purview of a statute relating thereto as directly "affecting interstate commerce". At page 934, this was said:

> "...It is true that the sales and deliveries of coal under consideration in this case were completely intrastate,

> but it is stipulated that the coal was used by Weirton Steel Company, the defendant, in the boilers and furnaces of its steel manufacturing plant at Weirton, West Virginia, the products of which have been largly (sic) sold and shipped to customers outside the State. The Commission, acting under the authority of §§4-A and 15 of the Act determined after hearing that such sales in West Virginia are subject to the minimum price requirements of the Act, and it is not disputed that such transactions directly affect interstate commerce in coal within the meaning of that phrase in the statute."

Accordingly, I hold that the selling by the defendants of over 10,000 tons of coal annually to a paper producer whose products are nationally distributed enters and affects interstate commerce within the meaning of §803 of the Act. Consequently, the plaintiff's motion for summary judgment will be granted.

ORDER OF COURT

AND NOW, To-WIT, this 27th day of September 1978, for the reasons set forth in the foregoing Opinion, the plaintiff's Motion for Summary Judgment is hereby granted.

/s/ LOUIS ROSENBERG
United States District Judge

cc:
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APPENDIX C

Public Law 91-173

AN ACT

To provide for the protection of the health and safety of persons working in the coal mining industry of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Federal Coal Mine Health and Safety Act of 1969".

FINDINGS AND PURPOSE

SEC. 2. Congress declares that—

(a) the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal mines is a serious impediment to the future growth of the coal mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this Act (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education, and Welfare and the Secretary of the Interior to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal miners; (2) to require that each operator of a coal mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal mining industry, research and development and training programs aimed at preventing coal mine accidents and occupationally caused diseases in the industry.

DEFINITIONS

SEC. 3. For the purpose of this Act, the term—

(a) "Secretary" means the Secretary of the Interior or his delegate;

(b) "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a

possession of the United States, or between points in the same State but through a point outside thereof;

* * *

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal mine;

* * *

(g) "miner" means any individual working in a coal mine;

* * *

MINES SUBJECT TO ACT

SEC. 4. Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

* * *

INSPECTIONS AND INVESTIGATIONS

SEC. 103. (a) Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this title. In carrying out the requirements of clauses (3) and (4) of this subsection, no advance notice of an inspection shall be provided to any person. In carrying out the requirements of

clauses (3) and (4) of this subsection in each underground coal mine, such representatives shall make inspections of the entire mine at least four times a year.

* * *

FINDINGS, NOTICES, AND ORDERS

SEC. 104. (a) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

* * *

INJUNCTIONS

SEC. 108. The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent (a) violates or fails or refuses to comply with any order or decision issued under this Act, or (b) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this Act, or (c) refuses to admit such representatives to the mine, or (d) refuses to permit the inspection of the mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine, or (e) refuses to furnish any information or report requested by the Secretary

or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this Act, or (f) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this Act. Each court shall have jurisdiction to provide such relief as may be appropriate. Temporary restraining orders shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce an order under clause (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this title, unless, prior thereto, the district court granting such relief sets it aside or modifies it. In actions under this section, subject to the direction and control of the Attorney General, as provided in section 507(b) of title 28 of the United States Code, attorneys appointed by the Secretary may appear for and represent him. In any action instituted under this section to enforce an order or decision issued by the Secretary after a public hearing in accordance with section 554 of title 5 of the United States Code, the findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

PENALTIES

SEC. 109. (a) (1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or

safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

• • •

TITLE I—AMENDMENTS TO THE GENERAL PROVISIONS OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

SHORT TITLE

SEC. 101. The first section of the Federal Coal Mine Health and Safety Act of 1969 is amended to read as follows: "That this Act may be cited as the 'Federal Mine Safety and Health Act of 1977' "

DEFINITIONS AND APPLICABILITY

SEC. 102. (a)(1) Section 2 of the Federal Coal Mine Health and Safety Act of 1969 is amended by inserting "or other" immediately after "coal" wherever it appears.

(2) Section 2(g)(1) of such Act is amended by striking out "the Interior" and inserting in lieu thereof "Labor".

(b)(1) Section 3(a) of such Act is amended by striking out "the Interior" and inserting in lieu thereof "Labor".

• • •

(4) Sections 3(d), (e), (g), and (j) of such Act are each amended by inserting "or other" immediately after "coal" wherever it appears.

• • •

(c) Section 4 of such Act is amended by inserting "or other" immediately after "coal".

• • •

CITATIONS AND ORDERS

"SEC. 104. (g)(1) If, upon any inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

"(2) No miner who is ordered withdrawn from a coal or other mine under paragraph (1) shall be discharged or otherwise discriminated against because of such order; and no miner who is ordered withdrawn from a coal or other mine under paragraph (1) shall suffer a loss of compensation during the period necessary for such miner to receive such training and for an authorized representative of the Secretary to determine that such miner has received the requisite training.

• • •

MANDATORY HEALTH AND SAFETY TRAINING

"SEC. 115. (a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that—

"(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;

"(2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;

"(3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section;

"(4) any miner who is reassigned to a new task in which he has had not previous work experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task;

"(5) any training required by paragraphs (1), (2) or (4) shall include a period of training as closely related as is practicable to the work in which the miner is to be engaged.

"(b) Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

* * *

No. 79-586

DEC 10 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM R. KRAYNAK, ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-15) is reported at 604 F. 2d 231. The opinion of the district court (Pet. App. 17-23) is reported at 457 F. Supp. 907.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16) was entered on August 22, 1979. The petition for a writ of certiorari was filed on October 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded that the provisions of the Federal Coal Mine Health and

Safety Act of 1969, 30 U.S.C. 801 *et seq.* (Coal Act)[1] apply where the only persons working in a mine are four brothers who own and operate it.

2. Whether the court of appeals properly concluded that, by selling more than 10,000 tons of coal annually to a paper producer whose products are nationally distributed, petitioners' operations affect interstate commerce within the meaning of the Coal Act.

STATEMENT

On April 27, 1977, authorized representatives of the Secretary of the Interior went to Kraynak Coal Company's No. 3 Mine in Indiana County, Pennsylvania, to conduct an inspection pursuant to 30 U.S.C. 813(a).[2] The inspectors were twice refused admittance

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[1]Effective March 9, 1978, the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. (Supp. I) 801 *et seq.*, extensively amended the Coal Act, renamed it the Federal Mine Safety and Health Act of 1977, and transferred administrative responsibility from the Department of the Interior to the Department of Labor. The provisions of the Coal Act germane to this case, however, were not significantly changed.

[2]30 U.S.C. 813(a) reads as follows:

> Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this subchapter. In carrying out the requirements of clauses (3) and (4) of this subsection, no advance notice of an inspection shall be provided to any person. In carrying out the requirements of clauses (3) and (4) of this subsection in each underground coal mine, such representatives shall make inspections of the entire mine at least four times a year.

(Pet. App. 18-19). The Secretary thereupon brought an action in the United States District Court for the Western District of Pennsylvania to enjoin petitioners from refusing to allow federal inspectors into the mine. The district court entered summary judgment in the Secretary's favor (Pet. App. 17-23) and the court of appeals affirmed (*id.* at 13-15).

The mine involved here is owned and operated by petitioners, who are four brothers. No other persons have worked for Kraynak Coal for at least seven years, and none is expected to do so in the future (Pet. App. 18). In 1977, Kraynak Coal produced 12,524 tons of coal, 9,000 tons of which came from Mine No. 3. More than 80% of Kraynak Coal's production that year, 10,268 tons, was delivered to Penntech Papers, Inc., a company based in Pennsylvania (*id.* at 19). Although the price Penntech paid varied, it was never less than $25 per ton (A. 52a-53a).[3] Thus, Penntech paid Kraynak Coal at least $256,700 for coal in 1977. Penntech is a paper processing corporation that depends upon out-of-state enterprises for supplies and raw materials. After manufacturing the paper, Penntech sells 95% of its products in states other than Pennsylvania (Pet. App. 19).

The district court held that the Coal Act covers mines in which the owners are the only miners. "The intent of Congress is unambiguous," said the court, "that operators working as miners are included in the Act" (Pet. App. 20). The court also held that by selling more than 10,000 tons of coal annually to Penntech, Kraynak Coal entered and affected interstate commerce within the meaning of the Act (*id.* at 23).

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[3]"A." refers to the appendix in the court of appeals.

The court of appeals affirmed per curiam. It agreed with the district court that the "statutory language is free from ambiguity" and covers mines worked solely by owners (Pet. App. 14) and that Kraynak Coal's products and operations entered and affected interstate commerce. "In enacting the statute," the court observed, "Congress intended to exercise its authority to regulate interstate commerce to 'the maximum extent feasible through legislation' " (*id.* at 14-15).

ARGUMENT

1. Petitioners maintain (Pet. 4-6) that Congress did not intend the Coal Act to cover mines in which only the owners mine coal and which, therefore, have no "employees" as such. This claim is insubstantial. The Coal Act, in unequivocal language, covers all mines (including ones that are owner-operated) and all miners (without regard to whether they are employees). The Act states that "[*e*]*ach coal mine*, the products of which enter commerce, or the operations or products of which affect commerce, *and each operator* of such mine, *and every miner* in such mine shall be subject to the provisions of this [Act]." 30 U.S.C. 803 (emphasis added). "[M]iner," in turn, is defined as "*any* individual working in a coal mine." 30 U.S.C. 802(g) (emphasis added).[4]

[4]This definition contrasts with the definition of "miner" in separte provisions of the Coal Act affecting black lung benefits. "[M]iner" was defined as "any individual who is or was *employed* in an underground coal mine." 30 U.S.C. (1970 ed.) 902(d) (emphasis added). Clearly, Congress knew how to limit coverage of a statute to employees when that was its intent.

The definition of "miner" for purposes of black lung benefits was changed by Section 2(b) of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, to include "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." Thus, owners who work in coal mines may now be eligible for black lung benefits.

The legislative history of the Coal Act is consistent with the Act's literal terms. As noted in *Marshall* v. *Donofrio*, 465 F. Supp. 838, 840 (E.D. Pa. 1978) (footnote omitted), aff'd, 605 F. 2d 1196 (3d Cir. 1979) (table), petition for cert. pending, No. 79-848:

> [T]here is evidence that Congress was expressly made aware of the possibility that owner-operated mines would be included within the Coal Mine Act's coverage at the time the Act was amended in 1966 to extend coverage to mines employing less than 15 men underground. *See* S. Rep. No. 1055, *reprinted* at 1966 U.S. Code Cong. & Admin. News, pp. 2072, 2087 (Statement of Senator Cooper). Although Congress was aware of the problem, it chose not to exempt such mines at that time or at any time subsequent.

It is therefore apparent that, as the court of appeals stated, the "statutory language is free from ambiguity and comports with the legislative purpose 'to require that * * * every miner in such mine comply with [the Act's] standards' " (Pet. App. 14). Hence, the court below correctly concluded that Kraynak Coal's operations are subject to the Coal Act, and further review is unwarranted.[5]

[5]There is no conflict among the circuits on this issue. Three times in recent months the Third Circuit has considered whether the Coal Act covers mines in which only the owners mine coal, and each time the court has concluded that it does. *Kleppe* v. *Shingara*, No. 76-2416 (Feb. 26, 1979); *Marshall* v. *Bosack*, No. 78-1803 (Jan. 15, 1979); *Marshall* v. *Donofrio*, *supra* (construing virtually identical provisions in the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. I) 801 *et seq.*). The Fourth Circuit has also considered the issue and held that such mines are covered. *Sink* v. *Kleppe*, 538 F. 2d 325 (1976) (table), cert. denied, 429 U.S. 1093 (1977).

2. Petitioners argue (Pet. 6-8) that the court of appeals erred in concluding that Kraynak Coal's operations affect interstate commerce within the meaning of 30 U.S.C. 803. This fact-bound claim is likewise without merit. As noted above, the record shows that Kraynak Coal annually sold more than 10,000 tons of coal, at a minimum of $25 per ton, to a paper producer. Using the coal for power, the paper company manufactured goods that were sold nationally. On these facts, the district court properly concluded that Kraynak Coal's activities directly affected commerce. See *Costanzo Coal Mining Co.* v. *Weirton Steel Co.*, 150 F. 2d 929 (4th Cir.), cert. denied, 326 U.S. 765 (1945).

Moreover, it is established that where Congress regulates a class of activity, all members of the class are covered, including a particular member whose activities are entirely intrastate. *Perez* v. *United States*, 402 U.S. 146 (1971). In enacting the Coal Act, Congress sought to regulate coal mining as a class. This is reflected in 30 U.S.C. 803, which extends the Act's coverage to "[e]ach coal mine * * * and every miner." Also indicative of congressional intent to cover coal mines as a class is the emphasis throughout the Act's prologue on conditions in "the Nation's coal mines," with no express limitation or exception (30 U.S.C. 801(c), (d), and (g)). In addition, as the court below noted (Pet. App. 14-15), the legislative history reveals that Congress intended to regulate coal mining "to the maximum extent feasible through legislation." S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966).

In any event, even purely intrastate activity may be found to affect interstate commerce when combined with the conduct of others similarly situated. *Wickard* v. *Filburn*, 317 U.S. 111 (1942). The cumulative effect of

small mine operations is far from trivial. In coal mining alone, there are 1,038 operations with four or fewer miners. These operations produce approximately 10.8 million tons of coal yearly. U.S. Mine Safety and Health Administration, *Information Report 1097* at 70-75 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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